BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. Opinion of the Court Below.

The opinion of the Supreme Court of Pennsylvania, reversing the judgment which was entered on a verdict rendered by a jury for petitioner, has not been reported in the Pennsylvania State Reports but is reported in Atlantic Reporter, 12 A. 2d 588 and appears at R. 351. The opinion was filed April 15, 1940. Petition for reargument and for vacation of the order of reversal was filed with the Supreme Court of Pennsylvania and was denied on May 6, 1940 (R. 356).

II. Jurisdiction.

1. *Statutory provisions believed to sustain jurisdiction.*

The petitioner invokes the jurisdiction of this court under Section 237 (b), as amended by the Act of February 13, 1925, of the Judicial Code, C. 229, Sec. 1, 43 Stat. 937, (28 U. S. C. A. Sec. 344).

2. *Statute of United States which is involved.*

The right or privilege so denied and rejected was specifically set up and claimed in the case at bar by petitioner as a defense under Sec. 3, par. (1) and par. (2) of the Interstate Commerce Act (49 U. S. C. A. Sec. 3) as amended August 12, 1935, C. 509, 49 Stat. 607, and March 4, 1927, C. 510, Sec. 1, 44 Stat. 1447, respectively, and the rule or order, known as Order *Ex Parte* No. 73, prescribed by the Interstate Commerce Commission of the United States, 171 I. C. C. 268, which govern the settlement of tariff rates and

charges on freight transported by railroad carriers to prevent unjust discrimination.

III. Statement of the Case.

A statement of this case appears under the heading "Summary Statement of the Matter Involved" in the foregoing petition, and, in the interest of brevity, is not here repeated.

IV. Specification of Errors.

1. The Supreme Court of Pennsylvania erred in reversing the judgment entered by the Court of Common Pleas of Venango County, Pa., upon the verdict of a jury in favor of petitioner, and in instructing judgment for freight charges to be entered for respondent in the amount of $9,569.60, with interest from November 3, 1932 (R. 356).

2. The Supreme Court of Pennsylvania erred in denying and rejecting the right and privilege specially set up and claimed by petitioner under the Interstate Commerce Act, Sec. 3, par. (1) and par. (2), and Order *Ex Parte* No. 73 prescribed by the Interstate Commerce Commission in accordance with said statute to govern the settlement of tariff rates and charges and prevent unjust discrimination.

3. The Supreme Court of Pennsylvania erred in its refusal to apply the law prescribed in the Interstate Commerce Act and the Order of the Interstate Commerce Commission, Order *Ex Parte* No. 73, relating to the payment of freight as a prerequisite to delivery in the case at bar which called for the application thereof.

4. The Supreme Court of Pennsylvania erred, under the uncontradicted proof of the violation by respondent of the law of the case in extending credit to consignee, by holding that petitioner was liable under Section 7 of the shipping contracts because of the failure to sign the stipulation in relief of that liability.

V. Summary of Argument.

1. The issue in the case at bar called for the application of the law, Sec. 3, par. (1) and par. (2) of the Interstate Commerce Act, and Order *Ex Parte* No. 73 of the Interstate Commerce Commission, issued pursuant thereto, to govern carriers by railroad when making delivery of freight at destination upon credit in lieu of payment of accrued tariff charges as a prerequisite to delivery.

2. The judgment entered on the verdict rendered by the jury upon this issue in favor of the petitioner was warranted and was erroneously reversed, on the theory that the petitioner, as shipper, was liable because it had not invoked the benefits of the stipulation under Section 7 of the bill of lading, despite the extension of credit to consignee by respondent contrary to the law prescribed to govern the shipments.

VI. Argument.

Petitioner believes the question presented is of such public interest and arises upon a Statute of the United States and so vitally affects and relates to the transportation of freight in interstate commerce by railroad carriers under such Statute, that presentation thereof for consideration and determination by this Honorable Court is called for in respect of the public policy declared by the Congress.

1. The issue in the case at bar called for the application of the law, Sec. 3, par. (1) and par. (2) of the Interstate Commerce Act, and Order *Ex Parte* No. 73 of the Interstate Commerce Commission, issued pursuant thereto, to govern carriers by railroad when making delivery of freight at destination upon credit in lieu of payment of accrued tariff charges as a prerequisite to delivery.

It is *uncontradicted* that possession of the cars was relinquished at destination by respondent to the consignee without the prior payment of the accrued freight charges and upon credit in a manner contrary to the Interstate Commerce Commission Order *Ex Parte* No. 73, which was introduced in evidence by petitioner as Exhibit B (342 a). This was the only evidence governing and controlling the delivery of freight in advance of the payment of the tariff charges. Delivery of the cars was made to consignee on a credit which not only was in violation of and contrary to Order *Ex Parte* No. 73 (305 a, 306 a, 307 a) but was in a stated sum for a period of 7 days or upwards not in excess of 2 weeks depending upon the date on which possession of the cars was relinquished, being in the nature of a credit for arrivals during one week to extend through all of the next following week (150 a, 153 a, 244 a, 246 a, 265 a). There was *no proof* in the case whatever that the credit extended conformed to any regulation in force.

The result under the decision sought to be reviewed is that the law binds the shipper to the strictest measure, but the carrier may make delivery of freight to a consignee upon credit in disregard of the law and in breach of the contract of shipment and may nevertheless thereafter recover from the shipper the charges for which such credit was extended and which the carrier does not finally collect from

consignee. If a railroad carrier justly stands in this position at law, then it stands in a different position from any other person to a contract.

Order *Ex Parte* No. 73 is made for the benefit of the carrier. Under it no consignee has any right to credit for freight charges. The Commission has no power to order any carrier to positively extend credit to a consignee. Under Order *Ex Parte* No. 73 the carrier may extend credit for 48 or 96 hours as therein indicated upon each shipment of freight transported, (R. 342 a) but the rule goes no further and does not permit of credit for a longer period or in a stated sum or any amount greater than the charges on each shipment, hence its true application in the case at bar and the erroneous rejection thereof by the Supreme Court of Pennsylvania.

Under the Interstate Commerce Act, as amended, C. 208, 46 Stat. 251 (49 U. S. C. A., Sec. 20, par. 11) every railroad in interstate commerce receiving property for transportation from any point in the United States to a point in an adjacent foreign country is required to issue a receipt or bill of lading and is liable for all loss, damage or injury to such property from its point of origin to its destination when transported on a through bill of lading. The contracts of shipment made in this case with the initial carrier (The Texas-Mexican Railway Company) were through contracts of shipment (R. 26 a). Order *Ex Parte* No. 73 became a part and the law of each of these contracts. Each was an entire contract governing the entire transportation and fixing the obligation of all connecting carriers. The several carriers are not independent parties to the contract but are merely agents of the carrier with whom the contract was made and it is the

duty of these connecting carriers to forward the goods in accordance with the contract and they are prevented by law from varying the terms of the contract. Cudhay Packing Co. v. Bixby, 205 S. W. 865, 248 U. S. 577; Freedman v. Erie R. R. Co., 246 Ill. App. 479; Lewis Poultry v. N. Y. C. R. Co., 105 A. 109; A. C. L. R. Co. v. Riverside Mills, 219 U. S. 186; T. & P. Rwy. Co. v. Leatherwoods, 250 U. S. 479; M. K. & T. R. Co. v. Ward, 244 U. S. 383.

Despite the law as declared respondent deliberately varied the terms of each contract of shipment and violated and breached each contract of shipment by making unto itself and the consignee a law for the delivery of the tank cars on credit wholly contrary to Order *Ex Parte* No. 73, without knowledge of, or consent or approval by, the petitioner who made each contract with a railroad of which respondent was a mere agent and bound to performance accordingly. Respondent operates its railroad interstate, within the United States as well as in Canada, and received each tank car at Joliet, Ill., for transportation thence to destination. It was bound by every provision in each contract of shipment and the law thereof and could not escape compliance with the contract which embraced Order *Ex Parte* No. 73. B. & O. R. Co. v. Domestic Hardwoods, 65 F. (2d) 488; Richardson & Sons v. The Burlington, 1931 Can. S. C. R. 76; Suzuki v. Cent. Argentino Ry., 27 F. (2d) 795; Great No. Ry. Co. v. Sullivan, 294 U. S. 458.

In B. & O. R. R. Co. v. Domestic Hardwoods, *supra*, it was held Jones' Tariff was applicable to a shipment from North Carolina into Canada and that the carrier operating in United States and Canada and receiving goods in the United States for transportation to Canada was subject to our laws.

In Richardson & Sons v. The Burlington (*supra*) the law of the United States, the place of contract and initial transportation was held to be applicable.

Petitioner could make no other contract of shipment than one embracing Order *Ex Parte* No. 73 and the respondent had no power to make any contract with the consignee for delivery of the cars on credit contrary thereto. This was the basis upon which petitioner contracted for an extension of credit by respondent to the consignee, if credit were to be extended.

If the carrier, as in the case at bar, is not bound by the contract of shipment and the law of that contract, and can substantially breach the same by wilfully extending credit to a consignee to the contrary, then the contract and the law regulating credit is to be cast aside in the face of the express mandate of Congress. A rule of action which permits or sanctions such result and denies to a shipper, as in the case at bar, the right of defense upon such breach seems unreasonable and untenable.

The Supreme Court of Pennsylvania by its decision erroneously denied and rejected the rights of petitioner claimed under the law of the case and by reversal of the judgment entered on the verdict of a jury not alone penalized petitioner for the unlawful conduct of respondent but affirmed the violation of law by respondent from such conduct, and rested its decision upon this aspect of the case on the point next discussed (R. 356).

2. The judgment entered on the verdict rendered by the jury upon this issue in favor of the petitioner was warranted and was erroneously reversed, on the theory that

the petitioner, as shipper, was liable because it had not invoked the benefits of the stipulation, under Section 7 of the bill of lading, despite the extension of credit to consignee by respondent contrary to the law prescribed to govern the shipments.

The failure of petitioner to sign the stipulation available under Section 7 of the shipping contract should not justly be construed to deprive the shipper of a right of defense which arises from a substantial breach of the contract of carriage. By failure to sign the stipulation, when considered in connection with Order *Ex Parte* No. 73, the shipper takes the risk of nonpayment of freight charges if and when, and only if and when, the carrier relinquishes possession at destination of the freight in accordance with Order *Ex Parte* No. 73. The liability of a shipper, as in the case at bar, for freight charges arises upon the contract of shipment and performance thereof by the carrier according to law. Each are bound alike and, whether or not the stipulation is signed, there is no absolute and unqualified liability upon such shipper under the contract. L. & N. R. R. Co. v. Central Iron & Coal Co., 265 U. S. 59.

Failure of petitioner to take advantage of Section 7 was not of itself a sufficient answer as was held as if petitioner was contending *only* that the respondent granted the consignee an *unreasonable credit period*. The question was not one of an unreasonable credit but was one of unlawful credit upon an absolute violation of the rule of law prescribing and limiting the only credit which could be extended in performance of each contract of shipment.

Failure of petitioner to invoke Section 7 did not remove or invalidate Order *Ex Parte* No. 73 as the governing law,

and leave respondent as its own law maker on the subject of credit. It is uncontradicted, nevertheless, that respondent did make its own law for extending credit. Having done so unreasonable preference or advantage was given to consignee and petitioner was subjected to undue and reasonable prejudice or disadvantage and to unjust discrimination, all of which the Interstate Commerce Act, including Order *Ex Parte* No. 73 prescribed thereunder, expressly prohibits. (U. S. C. A. Title 49, Sec. 3, pars. (1) and (2).)

This question calls for consideration by this Honorable Court of the effect of the deliberate breach of each shipping contract by a violation of the applicable law and Order *Ex Parte* No. 73, in making delivery of the cars at destination to the consignee upon credit contrary to the contract of shipment, embracing Order *Ex Parte* No. 73. Petitioner as shipper made no contract for credit such as extended by respondent. The failure to sign the stipulation under Section 7 is not the answer to this question. The verdict of the jury for petitioner must be taken to mean that the jury found as a fact, and in accordance with petitioner's first point for charge (R. 322 a) upon uncontradicated proof that the cars of oil were delivered to consignee at destination and the possession of respondent was relinquished without payment of the tariff rates and charges thereon and credit extended to the consignee not in accordance with the contract and the law thereof and that the contracts were thereby breached.

The decision of the Supreme Court of Pennsylvania is in express conflict with the declared public policy and involves

a substantial question of Federal law governing carriers by railroad which ought to be here determined.

Respectfully submitted,

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